

**TO: EDUCATIONAL PROFESSIONAL STANDARDS BOARD**

**FROM: MICHAEL HEAD, ASSISTANT ATTORNEY GENERAL, BOARD COUNSEL**

**RE: REPORT CONCERNING REGULATORY PROCEDURES FOR DISCIPLINARY ACTION RELATING TO CERTIFICATES**

**DATE: MARCH 20, 2015**

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#### **OVERVIEW:**

This report contains three sections:

- A summary of the author's activities since the last regular meeting of the Board.
- Fundamental points of administrative law bearing on a regulation that describes the procedures for disciplinary action against certificate holders.
- Recommendations to the Board.

#### **SUMMARY OF ACTIVITIES:**

At the Board's regular meeting on February 9, 2015, the Board asked the author to meet with stakeholders and help them draft consensus regulation language regarding procedures for disciplinary action against certificate holders, which language was to be submitted to the Board at its March 23, 2015, special meeting. The stakeholder meeting, held March 11, 2015, for the most part did not produce consensus language. While there was agreement on a few points—not on language but on general ideas—there was no agreement on major points of contention. Let me briefly describe my work leading up to and at the stakeholder meeting.

To help me prepare for the stakeholder meeting, I recommended to the Board's Chair that I speak with all the stakeholders beforehand, including the Board's counsel. This was a necessary step to understand the issues, which in turn was needed to prepare for a successful stakeholder meeting.

The Board's Chair approved my recommendation and also asked me to speak with Cabinet Secretary Zawacki, which I did. Those conversations revealed significant disagreements—especially between the Board's Legal Director and the teacher representatives—about the order of the steps in the disciplinary process, about the need for Board approval for some steps, and about the activities the Board's legal staff should be permitted to undertake even with Board approval. To address these disagreements, I focused my efforts on educating the parties on the customary procedural steps used in other boards' disciplinary regulations and on the principles of administrative law that must be reflected in the Board's regulation.

I invited the stakeholders to the meeting by an email dated February 25. **See Attachment A.** The email suggested an overall schedule, set forth goals for the regulation, and described the format for the

stakeholder meeting. The schedule was short, but necessary, in order to complete work before the Board's special meeting. I recommended a format that I hoped would make the meeting discussion manageable and would allow comments to be gathered and recorded in a form that could be used by the Board if the stakeholders did not reach a consensus.

The four goals for the regulation that I outlined in my invitation email are based on well-established principles of administrative law. These goals are:

1. The regulation should be clear about the procedures to be followed. To the fullest extent possible and appropriate, all procedures in the disciplinary process should be spelled out in the regulation and not left to internal policy. In other words, the regulation should give the public, and especially those accused, a clear understanding of what to expect.
2. The regulation's procedures should reflect the statutory authority granted for board action. Obviously, activities for which EPSB action is required should be approved by majority vote of a quorum of the Board at a duly noticed public meeting.
3. The regulation's procedures should reflect due process for individuals who are accused of violations. This means the Board should give accused individuals:
  - Adequate notice of charges;
  - A meaningful opportunity to be heard before disciplinary action is taken; and
  - After a hearing, a decision by impartial decision makers.
4. Disciplinary action that is taken before the conclusion of the administrative complaint-hearing process should be considered emergency action taken pursuant to the authority granted by KRS 161.120(6) and KRS 13B.125. Emergency action should be used when the evidence is clear, the violation is egregious, and the need for immediate action exists. This procedure should be spelled out in the regulation.

The schedule I announced in my February 25 email included a date by which the stakeholders could submit written input before the meeting in lieu of, or in addition to, the input that would be provided at the stakeholder meeting. Written input was received from John Fogle, attorney for KSBA, in the form of an email; Wayne Young, Executive Director of KASA, in the form of comments embedded in the then-current version of the draft regulation; and Mary Ruble, Assistant Executive Director of KEA, in the form of a document that suggested not regulation language, but general goals for the regulation that KEA sought to achieve. **See Attachments B, C, and D.**

I announced to everyone at the meeting that I would not dictate the language of provisions that should be submitted to the Board for its consideration. I viewed my role in the meeting to be threefold:

- Facilitate the stakeholders' discussion to develop consensus provisions and language that conformed to other professional licensing boards' disciplinary complaint and hearing procedure regulations, examples of which I provided to the stakeholders before the meeting.

- Educate the stakeholders about recognized principles of administrative law that bear on these procedures.
- Gather the stakeholders' input, including proposed regulation language, concerning the stages of the process about which they could not agree.

As to the latter point, in addition to having the meeting recorded, I also asked the Board's Executive Assistant to capture the stakeholders' comments in two documents, which have been, or will be, distributed to Board members. This was distributed to the stakeholders and comments were solicited. Attached is a responsive email from Dennis Janes and a document titled, "Governing rules for the EPSB disciplinary process," which contains the KEA's "General concerns about the EPSB disciplinary process." **See Attachments E and F.**

Consensus language for most of the complaint and hearing process could not be drafted at the stakeholder meeting primarily because the Board's Legal Director and the teacher representatives disagreed significantly about fundamental principles of administrative law applicable to the investigation, prosecution, and hearing of administrative cases, and applicable to the dissemination of information about those cases. The issues raised by those disagreements were:

- Whether the Board's legal staff, without Board approval, can conduct a preliminary investigation of a report or informal complaint against a credential holder.
- Whether the Board's legal staff, without Board approval, can investigate new charges discovered while investigating a report or informal complaint against a credential holder.
- Whether Open Meetings Law permits a complaint screening committee to deliberate in closed session about possible investigation and prosecution of charges against a credential holder.
- Whether records created or received in an administrative case against a credential holder can be protected from disclosure under Open Records Law prior to final action by the Board.
- Whether any Board actions prior to the final order in an administrative case against a credential holder constitute "final action."

If the Board does not have adequate legal advice concerning the issues listed above, it cannot properly deliberate the procedures it wants to implement.

## FUNDAMENTAL POINTS OF ADMINISTRATIVE LAW:

The following addresses the issues presented above.

1. CAN THE BOARD'S LEGAL STAFF CONDUCT A PRELIMINARY INVESTIGATION OF A REPORT OR INFORMAL COMPLAINT AGAINST A CREDENTIAL HOLDER WITHOUT BOARD APPROVAL?

ANSWER: No.

- No statute grants the Board's legal staff authority to investigate reports and complaints. In fact, the Board's statutes do not explicitly grant any individual or entity the authority to investigate complaints. However, KRS 161.120(2)(a) requires superintendents to "report in writing" to the Board, not to the legal staff; KRS 161.120(2)(c) authorizes the Board, not its legal staff, to "consider reports and complaints from other sources"; KRS 161.120(4) grants the Board, not the legal staff, authority to "issue a written admonishment to a certificate holder"; KRS 161.120(8) authorizes the Board, not the legal staff, to enter into agreed orders "during the investigative or hearing processes"; and KRS 161.028(1)(f) and 161.120(1) authorize the Board, not the legal staff, to take disciplinary action against a certificate and license holder. In other words, these laws and others make it clear that the General Assembly intended to grant the Board, not the legal staff, authority over the investigation, prosecution, and resolution of disciplinary actions. Thus, the Board's legal staff must obtain Board approval to investigate a case and issue charges.

2. DOES THE LEGAL STAFFS' "PRELIMINARY INQUIRY" INTO THE CREDIBILITY OF REPORTS AND COMPLAINTS CONSTITUTE INVESTIGATION?

ANSWER: The law concerning prosecutors' immunity from liability for their actions suggests the legal staffs' preliminary inquiry is investigation.

- Unlike absolute immunity, qualified immunity allows a plaintiff to argue that a government official was not acting in "good faith" in taking discretionary action within the scope of the official's authority. If the prosecutor has absolute immunity, no such analysis is permitted, and the prosecutor is immune from all liability for his or her actions.
- The law concerning the prosecutor's loss of absolute immunity is clear. In criminal law settings (also applicable to agency prosecutors), a prosecutor who performs the investigative functions normally performed by a detective or police officer, such as searching for the clues and corroboration that might provide probable cause for an arrest, is entitled only at most to qualified immunity. See *Prince v. Hicks*, 198 F.3d 607, 611 (6th Cir. 1999).
- A practical issue is raised by legal staff conducting their own investigation. If they do so, then at the hearing, the decision maker's ability to determine the facts is made more

difficult, at the least, by the defense counsel's arguments that the prosecutor's investigation influenced witness testimony.

3. CAN THE BOARD'S LEGAL STAFF, WITHOUT BOARD APPROVAL, INVESTIGATE NEW CHARGES DISCOVERED WHILE INVESTIGATING A REPORT OR INFORMAL COMPLAINT AGAINST A CREDENTIAL HOLDER?

ANSWER: Qualified no.

- First, as stated above, the legal staff should not investigate cases.
- This is a practical question. If the Board's investigator has received Board approval to investigate a report and complaint, and that approval is without restriction, the Board's legal staff can investigate all matters discovered in the course of investigating the report or complaint. The issue, however, is whether the Board wants to allow its investigator unrestricted authority to investigate any matter discovered in the course of an investigation. Just as the Board exercises its policy oversight in approving initial investigations, so the Board may want to exercise its policy oversight in approving the investigation of new charges.

4. CAN A COMPLAINT SCREENING COMMITTEE CONDUCT ITS BUSINESS IN CLOSED SESSION UNDER OPEN MEETINGS LAW?

ANSWER: Yes.

- First, any committee of a public agency is a public agency in and of itself per KRS 61.805(2)(g). Thus, public notice with an agenda and minutes, etc., are required for every committee meeting. If the committee establishes a regular meeting schedule per KRS 61.820 and adheres to that schedule, no additional notice is necessary for the committee to conduct its business.
- Also, KRS 61.810(1)(j) permits a board to go into closed session to consider and deliberate a grievance, report, or complaint against a licensee or certificate holder. Such a closed session must conform in all particulars with the requirements of KRS 61.815(1)(a) through (d), including the requirement that no final action may be taken during the closed session. *See In re: Jon L. Fleischaker/KY Bd. Of Medical Licensure*, 05-OMD-017, Feb. 9, 2005.

5. ARE RECORDS IN AN ADMINISTRATIVE DISCIPLINARY CASE AGAINST A CREDENTIAL HOLDER PROTECTED BY OPEN RECORDS LAW EXEMPTIONS FROM DISCLOSURE PRIOR TO FINAL ACTION BY THE BOARD?

ANSWER: Yes.

- See KRS 61.878(1)(h), (i), and (j).

- The Open Records law exemption that permits the Board to prevent disclosure of this information can be waived. The Board currently waives this exemption by its flagging procedure, which allows a limited group of individuals access to preliminary information about the Board's disciplinary actions. A question is whether this waiver prevents the Board from asserting the Open Records law exemption when other individuals or entities request the same information.

6. ARE ANY OF A BOARD'S ACTIONS PRIOR TO THE FINAL ORDER IN AN ADMINISTRATIVE CASE AGAINST A CREDENTIAL HOLDER "FINAL ACTION" UNDER OPEN RECORDS LAW?

ANSWER: NO.

- The Board's Legal Director takes the position that any vote by the Board to approve a case investigation or to approve the initiation of charges constitutes final action, which must be disclosed upon request. Similarly, the Board's Legal Director believes any recommendation by a screening committee also would constitute final action requiring disclosure upon request. Neither position is correct.
- See KRS 13B.010(6) for the definition of a final order in an administrative hearing.
- See also, e.g., *Univ. of Louisville v. Sharp*, 416 S.W.3d 313 (Ky. App. 2013) (Under Open Records Law, a "meeting must resolve the ultimate issue to constitute 'final action' and piecemeal disclosure along the path of the decision-making process is not mandatory").

7. DOES OPEN RECORDS LAW REQUIRE DISCLOSURE OF AN INITIAL COMPLAINT/REPORT ONCE THE BOARD TAKES FINAL ACTION?

ANSWER: Qualified yes.

- See *City of Louisville v. Courier-Journal and Louisville Times Co.*, Ky. App., 637 S.W.2d 658 (1982) ("[C]omplaints which had spawned the investigation could not be deemed preliminary [after final action], at least not on the same theory: 'Inasmuch as whatever final actions are taken necessarily stem from them, they must be deemed incorporated as part of those final determinations.'").
- But see, *Ky. Bd. Of Examiners of Psychologists, et al. v. The Courier-Journal, et al.*, 826 S.W.2d 324 (Ky. 1992) (initial complaints may still be protected under KRS 61.878(1)(a) "where public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy").

## RECOMMENDATIONS:

This report provides the Board with information about the law's requirements, its protections, and its prohibitions. Again, the Board should consider this information in deciding the procedures it wants to implement for disciplinary actions against certificate holders and licensees. Additionally, the Board should consider best practice and the Board's policy interests. Merely because the law allows the Board to implement a procedure does not mean that procedure serves the Board's interests in the current situation. With this in mind, I recommend the following:

1. Ask questions at the special meeting, but don't attempt to write the regulation. A wide gulf still exists between the stakeholders' and the Board legal staff's positions concerning the procedures that should be used, and the language necessary to implement those procedures.
2. Form a committee of Board members to work on writing the regulation and to report back to the full Board at its June regular meeting. The process of regulation writing is too technical and the issues are too complicated to try to write the regulation in a full board meeting.
3. The Board, or its regulation writing committee if it constitutes one, should use the "Outline for Analyzing Administrative Complaint and Hearing Procedures" that I have attached to this report. **See Attachment G.** I prepared this Outline for the stakeholder meeting to help identify the necessary provisions of the Board's regulation.
4. Review the examples of other boards' regulations that I provide as attachments to this report. **See Attachment H,** which contains a "List of Other Boards' Complaint Procedure Regulations" and five examples of other boards' regulations. These five examples give guidance about the provisions and language for the Board's procedural regulation.

I will be available for questions from the Board at its special meeting. Let me know if I can be of further help to the Board in writing its regulation.

**Head, Michael (KYOAG)**

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**From:** Head, Michael (KYOAG)  
**Sent:** Wednesday, February 25, 2015 10:34 AM  
**To:** Sneed, Alicia (EPSB); 'wayne@kasa.org'; 'john.fogle@ksba.org';  
'rjackson@elpolaw.com'; 'dennis.janes@kea.org'; 'mary.ruble@kea.org';  
'bridget.brown@kea.org'; 'dcourtney@murray-ky.net'; 'jsmccomb@brooksfirm.com'  
**Cc:** Brown, Robert L (EPSB); Abshire, Ashley (EPSB)  
**Subject:** stakeholder meeting re: draft disciplinary procedures regulation  
**Attachments:** 150209 draft of 16 KAR 1 030.docx

All:

I am the Assistant Attorney General assigned as counsel to the Education Professional Standards Board. I am writing in that capacity.

I am sending this email to individuals whom the Board identified as representatives of stakeholders interested in the regulation that the Board is considering for its disciplinary process. The Board tasked me to meet with identified stakeholder representatives and to develop, if possible, agreed upon proposed language for the regulation, which will be presented to the Board at its March 23 Special Meeting.

In this email, I want to suggest a schedule, set forth goals, and describe the format for the stakeholder meeting and for the subsequent report to the Board.

**PROPOSED SCHEDULE:**

- March 6: Date by which I will ask all stakeholders to send me input they think might help me facilitate the meeting, including draft regulation language.
- March 11: Date for the stakeholder representative meeting at the Board's offices. I'd like to begin by 11 am. I'm starting late in the morning to allow out-of-town representatives to attend without having to come to Frankfort the night before. The EPSB will provide lunch. I hope to work through to a conclusion by the end of this day. Please let me know immediately if this date is not convenient.
- March 19: This is the date by which I would like to send the Board members my report of the stakeholder meeting. If there is not agreement on language, I intend to collect the input from the meeting members as it is given. The input from stakeholders will be organized and presented in toto to the Board, including:
- Proposed regulation language for each stage of the complaint procedure that either has been agreed to by all the stakeholders or has been offered by a stakeholder individually. The Board will be provided this language with the stakeholders' comments.
  - Examples of other statutes and regulations that address the formal complaint procedure.
- March 23: Special meeting of the Board regarding the regulation. At the Board's meeting, I will make myself available for questions about the interests served by any of the language put before the Board.

**GOALS:**



In attempting to develop agreed upon language for the regulation, I believe the stakeholder group should seek to achieve the following objectives, which are based on well-established principles of administrative law:

1. The regulation should be clear about the procedures to be followed. To the fullest extent possible and appropriate, all procedures in the disciplinary process should be spelled out in the regulation and not left to internal policy. In other words, the regulation should give the public, and especially those accused, a clear understanding of what to expect.
2. The regulation's procedures should reflect the statutory authority granted for board action. Obviously, activities for which EPSB action is required should be approved by majority vote of a quorum of the Board at a duly noticed public meeting.
3. The regulation's procedures should reflect due process for individuals who are accused of violations. This means the Board should give accused individuals:
  - Adequate notice of charges;
  - A meaningful opportunity to be heard before disciplinary action is taken; and
  - After a hearing, a decision by impartial decision makers.
4. Disciplinary action that is taken before the conclusion of the administrative complaint-hearing process should be considered emergency action taken pursuant to the authority granted by KRS 161.120(6) and KRS 13B.125. Emergency action should be used when the evidence is clear, the violation is egregious, and the need for immediate action exists. This procedure should be spelled out in the regulation.

#### **FORMAT OF STAKEHOLDER MEETING AND REPORT TO THE BOARD:**

I intend to act as facilitator for the meeting. I do not intend to dictate how the language of the regulation should read. I'd like to propose a framework for the discussion that will allow everyone to have their say but which will keep things moving.

First, I will have the group discuss the regulation in stages. For each stage, I would like the group to discuss legal requirements that bear on the procedures, namely, the legal requirements for "agency action" and for "due process." The "stages" and legal issues that I see are as follows:

1. Receipt of an "informal complaint" and the procedure that follows. Included in the discussion should be what actions Board staff can take without Board approval, who makes recommendations to the Board if Board approval is required, and whether there should be a timeframe for staff and/or Board action.
2. Initiation of investigation. Included in this discussion should be whether investigation can be initiated without Board approval, how the scope of investigation is decided, what tools of investigation can be used, whether staff can investigate charges that the Board has not reviewed and approved for investigation, and whether there should be a timeframe for concluding an investigation and issuing charges.
3. Issuance of a formal complaint. Included in this discussion should be whether Board staff can initiate formal charges without Board approval, who makes recommendations to the Board if Board approval is required, and whether there should be timeframes for a hearing to be held.
4. There also should be a discussion of the Board's use of emergency power authorized by KRS 161.120(6). The regulation should specify the charging process to be used when the Board uses its emergency power.

Second, here is the format I will use in leading the discussion concerning the proposed language for each stage of the process:

1. I intend to put before the group each stakeholder's proposed language for each stage. Each proposed provision or set of provisions will be a Word document that will be displayed on the EPSB's overhead screen.
2. I intend to divide the attendees into two groups, those who are involved in bringing charges and those involved in defending those charged. Obviously, there may be some overlap in the groups, but for the most part, the stakeholders represent these two viewpoints.
3. To expedite the receipt of comments, I will have a spokesperson for each group—first from the proponents of the language, then from the "opponents"—offer comments about the proposed language.
4. To the extent the spokesperson has not covered all points that can be made about the language, I'll allow others in the two groups to add comments, if necessary.
5. Using MSWord's Comment feature, I'll have EPSB staff embed in each document all comments about each stakeholder's proposed language.
6. I would like the group to receive comments regarding each example of proffered language before attempting to reach agreement on language.
7. If there appears to be general agreement, the EPSB's staff person will type in a separate document the proposed, agreed upon language.
8. We will go through the stages of the disciplinary process outlined above and address each of the stakeholders' proposed language for each stage.

I intend to lead discussion to try to find common ground. Where agreement cannot be reached, I intend to put the stakeholders' separate submissions, with embedded comments, before the Board at its special meeting scheduled for March 23.

By March 6, please submit to me as an email attachment, and in Word format, proposed language that you would like to see in the regulation. You can submit this language in a single document or you can provide provisions for separate stages and submit separate files. Please send all of this email's invitees a copy of your email and attachments.

I have attached to this email for your review a copy of the draft of the regulation that was submitted to the Board at its last regular meeting on February 9. I understand that Alicia Sneed, the Board's Legal Services Director, has made additional revisions to this document. I will have her submit to me, and copy all of you with, her current version by March 6.

I look forward to seeing everyone at the meeting on March 11. I am very hopeful that the group can come to a consensus on most if not all of the language in this regulation.

Sincerely,

Michael Head  
Assistant Attorney General  
Office of the Attorney General  
700 Capital Ave., Rm 28  
Frankfort, KY 40601  
502-696-5627  
502-564-6801 - FAX

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**Head, Michael (KYOAG)**

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**From:** Fogle, John - KSBA <jfogle@ksba.org>  
**Sent:** Monday, March 09, 2015 11:07 AM  
**To:** Head, Michael (KYOAG); Sneed, Alicia (EPSB); wayne@kasa.org; rjackson@elpolaw.com; dennis.janes@kea.org; mary.ruble@kea.org; bridget.brown@kea.org; dcourtney@murray-ky.net; jsmccomb@brooksfirm.com  
**Cc:** Brown, Robert L (EPSB); Abshire, Ashley (EPSB)  
**Subject:** RE: stakeholder meeting re: draft disciplinary procedures regulation (KSBA Reply)

Dear Mr. Head,

Thank you for the opportunity to provide input on the proposed draft EPSB regulation included with your e-mail of February 25, 2015 (16 KAR 1:030) on behalf of KSBA. I understand there may be further draft changes, but we wish to voice the following concerns. Proposed Section 1(2) of the draft provides that a committee of three teacher representatives of the EPSB "shall determine whether to initiate a disciplinary action" after review of the report or complaint. If the "committee" concept is retained (see Wayne Young's comment), we believe the composition of such a committee should be more reflective of the constituencies making up the EPSB. We submit the membership should consist of one representative from higher education, one teacher, and one school administrator OR the school board representative. Compare KRS 161.028(2). Given that the role of this committee apparently is to "winnow out" complaints where jurisdiction is lacking or where the face the complaint or report fails to support any action on a certificate authorized under KRS 161.120(1), we also believe it would make sense to utilize language authorizing any such committee to receive advice and input from EPSB legal staff. Clearly, this process entails legal judgment that would call for input of agency counsel. Second, we believe that the regulatory language should contain some standards covering the determination at issue. For example, the regulation could provide that no complaint shall be initiated where the facts as alleged in a report or complaint do not support action on certificate under KRS 161.120(1) or do not support EPSB jurisdiction.

We appreciate the invitation to set forth in your e-mail. At this juncture we do not plan to attend your proposed March 11 meeting since we have set out our key concerns above. We reserve the right to modify or expand on the above and interject comments as permitted under KRS Chapter 13A in the event a formal regulation is promulgated. In the meantime, I am available to discuss the above or any aspect of this process informally with any recipient of this e-mail. Thank you.

John C. Fogle III, KSBA Staff Attorney

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**From:** Head, Michael (KYOAG) [mailto:Michael.Head@ky.gov]  
**Sent:** Wednesday, February 25, 2015 10:34 AM  
**To:** Sneed, Alicia (EPSB); wayne@kasa.org; Fogle, John - KSBA; rjackson@elpolaw.com; dennis.janes@kea.org; mary.ruble@kea.org; bridget.brown@kea.org; dcourtney@murray-ky.net; jsmccomb@brooksfirm.com  
**Cc:** Brown, Robert L (EPSB); Abshire, Ashley (EPSB)  
**Subject:** stakeholder meeting re: draft disciplinary procedures regulation

All:

I am the Assistant Attorney General assigned as counsel to the Education Professional Standards Board. I am writing in that capacity.

**WAYNE YOUNG SUBMISSION 16 KAR 1:030. Procedures for certificate revocation, suspension, reinstatement and reissuance, and application denial.**

RELATES TO: KRS 161.028(1), 161.120, 218A.010(5)

STATUTORY AUTHORITY: KRS 161.028(1), 161.175(2)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 161.028(1) authorizes the Education Professional Standards Board to establish standards and requirements for obtaining and maintaining a teaching certificate. KRS 161.175(2) authorizes the Education Professional Standards Board to promulgate administrative regulations requiring a teacher whose certificate has been suspended or revoked by the Education Professional Standards Board because the teacher engaged in misconduct involving the illegal use of controlled substances to submit to drug testing. This administrative regulation identifies the conditions for initiating a disciplinary action against a teaching or administrative certificate and establishes procedures for certificate reinstatement, reissuance, and application denial.

Section 1. Initiating Disciplinary Action Against a Certificate. (1) The Education Professional Standards Board may initiate disciplinary action against a Kentucky teaching or administrative certificate upon receipt from any source of a report or complaint which contains allegations that an individual who holds a Kentucky teaching or administrative certificate has engaged in conduct listed in KRS 161.120(1).

~~(2) The report or complaint shall be reviewed by a committee of the Education Professional Standards Board. The committee shall consist of three teacher representatives of the Education Professional Standards Board who shall determine whether to initiate a disciplinary action.~~

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Comment [WY1]: I cannot think of any need or rationale behind adding this layer of procedure. I would remove this provision.

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1        (32) Upon initiating a disciplinary action against a Kentucky teaching or administrative  
2 certificate, the Education Professional Standards Board shall send a copy of the report or  
3 complaint to the certificate holder.

4        (43) The certificate holder shall have thirty (30) days from receipt of the report or  
5 complaint to submit a written rebuttal to the allegations.

6        (54) At the conclusion of the thirty (30) day rebuttal period or upon receipt of the  
7 rebuttal, whichever occurs first, the complaint or report shall be prepared for initial review by the  
8 Education Professional Standards Board at its next regularly scheduled meeting.

9        (65) At the initial review of the disciplinary action, the Education Professional Standards  
10 Board shall review a summary of the complaint or report and a copy of the rebuttal. The  
11 summary and the rebuttal shall be redacted to remove proper names of persons and places to  
12 ensure the certificate holder's confidentiality during the initial review.

13        (76) At the conclusion of the initial review, the Education Professional Standards Board  
14 may take the following actions:

15        (a) Defer consideration of the disciplinary case until a future meeting for further  
16 information;

17        (b) Dismiss the disciplinary case;

18        (c) Defer consideration of disciplinary case until a future meeting to give the certificate  
19 holder an opportunity to complete remedial training, fitness assessment or counseling in  
20 exchange for a dismissal of the disciplinary case;

21        (d) Admonish the certificate-holder in accordance with KRS 161.120(4); or

22        (e) Order an investigation into the allegations found in the complaint or report.

**Comment [WY2]:** I would add this, as I don't believe it falls within training or counseling

(87) If other allegations of misconduct arise during the investigation into the allegations found in the complaint or report, they may be investigated without further action by the Education Professional Standards Board.

(98) If the Education Professional Standards Board orders an investigation into the allegations, the investigation must be completed within ninety (90) days. If the investigation is not completed within ninety (90) days, the case must be brought back before the Education Professional Standards Board with a memo explaining why the investigation has not been completed, and requesting an extension of time to complete the investigation.

(10) At the conclusion of the investigation:

(a) If there is no credible evidence that the allegations of misconduct occurred, the disciplinary case shall be presented to the Education Professional Standards Board at its next regularly scheduled meeting to be dismissed; or

(b) If there is credible evidence that an individual who holds a Kentucky teaching or administrative certificate has engaged in conduct listed in KRS 161.120(1), the disciplinary case shall be prepared for a hearing in accordance with KRS 161.120 (5)(a).

~~(c) The respondent may make a written request for a hearing. Education Professional Standards Board Legal Staff must prepare and file administrative charges within twenty (20) days of the receipt of the request. If the investigation is not completed, the charges must be filed within twenty (20) days of the conclusion of the investigation.~~

Section 2. Reinstatement and Reissuance of Certificate. (1)(a) A certificate that has been suspended by the Education Professional Standards Board shall not be reinstated until the certificate holder has met all conditions and requirements ordered by the Education Professional Standards Board.

Comment [WY3]: "shall" rather than "must"

Comment [WY4]: "shall"

Comment [WY5]: Is ninety days enough? I would like staff to respond

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Comment [WY6]: I don't fully understand when and under what circumstances this hearing request would occur. Does it apply to both (a) and (b)? I believe the Kentucky Court of Appeals has held that there is no right to a hearing on charges that have been dismissed

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(b) If a certificate lapses during a period of suspension, at the end of the suspension period and upon completion of all conditions and requirements ordered by the Education Professional Standards Board, the certificate holder shall apply for renewal of the certificate and shall meet all educational requirements for renewal of the certificate.

(2) An individual whose certificate has been revoked shall complete the Form CA-1, [~~"Application for Kentucky Certification or Change in Salary Rank", Form TC-1,~~] incorporated by reference in 16 KAR 2:010, and pay all applicable fees in accordance with 16 KAR 4:040 prior to the reissuance of the certificate.

(3) The burden of proving suitability for reissuance of a revoked certificate shall rest on the applicant seeking reinstatement.

(4) If reissuing a certificate, the Education Professional Standards Board may include terms and conditions that the board reasonably deems appropriate as a condition of reissuance in accordance with KRS 161.120(11)(b).

(5) An applicant for reissuance of a revoked certificate shall satisfy all current educational requirements for the certificate.

(6)(a) If a certificate is suspended or revoked because the certificate holder engaged in misconduct involving the illegal use of a controlled substance as defined in KRS 218A.010(5), in addition to conditions for reinstatement or reissuance, the certificate holder shall at the certificate holder's own expense provide written evidence that the certificate holder has submitted to a drug test administered by a drug testing facility approved by the Education Professional Standards Board within thirty (30) days of reinstatement or submission of an application for reissuance of the certificate.



(b) If the results of the drug test indicate drug use by the certificate holder, the certificate shall not be reinstated or reissued.

(c) The certificate holder shall arrange for the drug testing facility to send the results of the drug test directly to the Education Professional Standards Board.

(d) A drug test conducted under this subsection shall at a minimum test for the following controlled substances:

1. Marijuana;
2. Cocaine;
3. Opiates;
4. Amphetamines;
5. Phencyclidene;
6. Morphine;
7. MDMA (Ecstasy);
8. Methadone;
9. Benzodiazepines;
10. Barbiturates; and
11. Oxycodone.

(e)1. A certificate holder subject to the terms of this subsection may petition the Education Professional Standards Board to approve a drug testing facility of the certificate holder's choice.

2. The petition shall contain the following information:

- a. The drug testing facility's name and location;
- b. The name and telephone number for the director of the facility;

- c. The method of test specimen collection;
- d. The drug testing facility's method of assuring identity of the test subject;
- e. Procedures for testing specimens, including forensic testing methods; and
- f. Chain of custody protocols.

Section 3. Denial of Application for a Certificate. If the Education Professional Standards Board denies an individual's application for a Kentucky teaching or administrative certificate pursuant to this administrative regulation, the individual may file an appeal in accordance with KRS 161.120(5)(a)2.

## KEA SUGGESTED PROVISIONS

### General Provisions:

1. All information received during the course of an investigation and hearing shall be treated as confidential until such time as the EPSB takes final action. Information that could identify an educator reported to the EPSB for alleged wrongdoing shall not be disclosed to the board or to the public, except as may be required by law.
2. Any timeline set out herein may be waived by mutual agreement of the parties or waiver may be granted by the board for good cause shown.
3. If a board member has participated in the investigation of a report or has substantial independent knowledge of facts that may influence an impartial decision by the member, that member shall not participate in intermediate decisions or final adjudication on the report. However, information about a report obtained only through service on the disciplinary screening committee shall not disqualify the member.
4. All reference to "days" means calendar days unless otherwise specified.

**Receipt of Reports and Initial Screening:**

1. The EPSB receives a written report that allegedly describes behavior that could warrant action against an educator's certificate. A written report shall be accepted if it is accompanied by sufficient supporting evidence as would allow the board to believe, based upon a totality of the circumstances, that a reasonable probability exists that the report is meritorious.
2. Within ten (10) days of receipt of the report, the executive director or designee shall make a preliminary determination whether the allegations contained in the report, if true, fall within the disciplinary authority of the board. No action shall be taken on reports that do not meet that standard, except that the affected educator shall be provided a copy of the report and will be told that no action will be taken, no response is necessary and that the report will not form the basis of any future disciplinary action against the teacher.
3. At each of its meetings, the screening committee will be provided statistics showing the total number of reports received since its previous meeting, the number of reports that did not fall within the disciplinary authority of the board and the reasons for those determinations.

**Rebuttal:**

1. Reports that allege circumstances that, if true, fall within the disciplinary authority of the board shall be assigned a tracking number and referred to the disciplinary screening committee. No disciplinary case shall be officially opened until the full board takes action.
2. The affected educator shall be provided a full copy of the report and any supporting documentation submitted and shall be informed which section of KRS 161.120(1) may be violated. Service of this information to the educator shall be by certified mail, return receipt requested. A written rebuttal may be tendered to the EPSB within thirty (30) days of the date of receipt. An additional thirty (30) days to submit a rebuttal shall be granted by the executive director or designee upon request.

### **Disciplinary Screening Committee:**

1. Within ten (10) days of receipt of the educator's rebuttal or the date a rebuttal was due, whichever is earlier, the matter shall be submitted to the disciplinary screening committee.
2. The disciplinary screening committee shall comprise three (3) members of the EPSB who are K-12 educators. At least two (2) members of the committee shall be classroom teachers who are not administrators. The committee members shall be appointed by the chair, will serve one (1) year terms and may succeed themselves.
3. The members of the disciplinary screening committee shall receive an impartial summary statement of the facts of the report with all identifying information redacted. The summary shall identify by reference and recitation of language the provision of KRS 161.120 the allegation may fall within and shall summarize the evidence submitted in support of the allegations. The committee shall receive a full copy of the educator's rebuttal, with all identifying information removed.
4. The disciplinary screening committee shall evaluate the summary and redacted rebuttal and shall determine whether the facts presented, if true, constitute a violation of any subsection of KRS 161.120(1) that warrants disciplinary action by the full board.
5. If the disciplinary screening committee determines that there is insufficient evidence of a violation, or that no violation has occurred, or that the local administration took effective remedial action or that the allegations, even if true, constitute a de minimus violation of KRS 161.120(1) that does not warrant disciplinary action by the full board, no further action shall be taken.
6. The remaining reports shall be referred to the full board for disposition at the next regularly scheduled meeting. The disciplinary screening committee may make a recommendation for disposition to the full board, but is not required to do so.
7. General Counsel for the EPSB may advise the disciplinary screening committee at its request. The committee should strive to reach consensus on each case but may act by a majority vote of its members.
8. The affected teacher shall be notified of the disciplinary screening committee's decision, in writing, within five (5) days of the date the decision is made. The educators who are referred to the full board shall also be informed of any recommended disposition and shall also receive a copy of the summary statement provided to the disciplinary screening committee.

**Presentation to EPSB and Initial Disposition:**

1. The material reviewed by the disciplinary screening committee and the committee's written recommendation for disposition, if any, shall be presented to the full board in closed session at the next regularly scheduled board meeting.
2. The board may accept or modify any recommendation of the disciplinary screening committee.
3. Options for disposition by the board at this stage shall be: 1) dismiss, meaning that no action shall be taken against the certificate based on the report; 2) dismiss as remediated; 3) conditionally dismiss with referral for relevant training; 4) written admonishment, or: 5) refer for additional investigation.
4. All dismissals shall be with prejudice.
5. Dismiss as remediated means that the information presented, if true, constitutes a violation of KRS 161.120(1), but that the actions taken or the training provided at the local level were sufficient and no further action is required.
6. The board may conditionally dismiss a report with referral for relevant training. If this action is taken, the referral shall specify the type of training required and shall inform the educator of possible sources of the training. The affected educator shall have up to one (1) year to complete the required training. Proof of completion of required training shall be submitted to the board through the executive director or designee. The proof of completion shall be submitted to the board at its next regularly scheduled meeting following receipt thereof and the case shall be dismissed with prejudice. If the educator fails to comply with the training requirements within the time allowed, the matter shall be returned to the active case docket for further consideration by the board.
7. The board may issue a written admonishment pursuant to KRS 161.120 (4) and shall notify the affected educator of the right to demand a hearing.
8. Written notice of the board action, including the name and contact information for the assigned EPSB attorney, if any, shall be mailed to the affected teacher within five (5) days.
9. The board shall receive updates on the status of open disciplinary cases at least every one hundred eighty (180) days after the date the case is initially opened, but may request more frequent updates.

### **Referral for Investigation:**

1. If a report is referred for investigation, the investigation shall be completed within one hundred eighty (180) days from the date the board makes the referral, unless the affected teacher requests in writing that the matter be held in abeyance or advanced for expedited review. Written requests for abeyance shall be made to the assigned EPSB attorney and shall be granted. The abeyance shall be reported to the board at its next regularly scheduled meeting. The affected teacher shall promptly inform the assigned staff attorney when the matter forming the basis for the abeyance has been resolved, at which point the one hundred eighty (180) day timeline for investigation will begin again. If the affected teacher requests expedited consideration, the provisions of paragraph 30 shall become effective within 10 days of the request for expedited review.
2. If, during the course of an investigation, evidence is discovered that indicates possible additional violations of KRS 161.120(1) that were not included in the report being investigated, the assigned attorney shall promptly make a separate written report to the affected educator, which shall meet the criteria set out in paragraph 1. If the affected teacher is represented by counsel, the written report may be served on the teacher by providing it to counsel. If the affected teacher is not represented, the written report of additional allegations shall be made to the affected teacher by certified mail, return receipt requested. Within ten (10) days of the date of receipt, the affected educator shall elect to merge the new report with the original report under investigation or may elect to have the new report processed in the same manner as a report from any other source. The election shall be in writing and shall be provided to the assigned EPSB attorney, who shall proceed accordingly. If an election is not timely made, the additional report shall be merged with the existing investigation.



**Actions upon Conclusion of Investigation:**

1. The board and the affected educator shall be informed when an investigation is completed.
2. A detailed report of the results of the investigation shall be provided to the affected teacher within thirty (30) days following the expiration of the investigatory period. The detailed report shall include a summary of the relevant evidence collected, including all exculpatory evidence known to the EPSB attorney. The educator shall be informed of the names of witnesses that could testify against him or her. The assigned EPSB attorney shall simultaneously tender an initial offer of settlement, if the evidence collected will support disciplinary action by the full board.
3. Settlement negotiations may continue until an Agreed Order is ready for submission to the board or until either party makes a written request to schedule a hearing, whichever first occurs.
4. If probationary or supervisory conditions are agreed to by the parties or are imposed after a hearing, the conditions shall be specific and shall not exceed a period of two (2) years. If the EPSB receives a report during the probationary period that alleges a violation of a specific term of probation, the matter shall be returned to the active case docket for further consideration by the board.

**Requests for Hearing:**

1. Written requests to schedule a hearing shall be served upon the opposing party and copied to the executive director or designee. The EPSB shall have five (5) days from the date of receipt to notify the Administrative Hearings Division of the Attorney General's office.
2. Written charges shall be served upon the affected educator within twenty (20) days of the date the executive director or designee receives notice that a hearing is requested.
3. Hearings shall be scheduled to begin no sooner than thirty (30) days but no more than ninety (90) days from the date the charges are received by the affected educator.

**Emergency Action:**

1. If the EPSB receives a report that alleges facts that, if true, indicate an immediate danger to the public health, safety or welfare as the result of the alleged actions of a certificate holder, the executive director or designee shall immediately inform the chair of the EPSB.
2. The chair shall, upon consultation with the executive director, determine whether to issue an emergency order to temporarily restrict the educator's certificate. If an emergency order is issued, it shall comply with the requirements of KRS 13B.125(2). The emergency order shall also notify the certificate holder of the right to request an emergency hearing pursuant to KRS 13B.125 and shall provide contact information for the EPSB chair and the clerk of the Administrative Hearings Division of the Attorney General's office.
3. The emergency order shall be served upon the affected educator and the superintendent of the employing school district as required by KRS 13B.050(2). A copy of the emergency order shall be simultaneously provided to the clerk of the Administrative Hearings Division of the Attorney General's office.
4. If an emergency order is issued, the chair and the executive director shall immediately notify the other members of the EPSB that emergency action has been taken. No identifying information shall be provided to other members of the board. Notice of an emergency action may be provided to other members of the board electronically.
5. Emergency action shall not affect a certificate holder's contract or tenure rights in the school district.
6. Within five (5) days of the date of receipt of the emergency order, the certificate holder may request an emergency hearing pursuant to KRS 13B.125 by sending written notice to the chair and the clerk of the Administrative Hearings Division of the Attorney General's office. The request for emergency hearing may be delivered electronically.
7. All information that forms the basis for the emergency order shall be deemed preliminary and shall be held in confidence until an order is issued pursuant to KRS 13B.125(3).

**Head, Michael (KYOAG)**

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**From:** Janes, Dennis [KY] <Dennis.Janes@kea.org>  
**Sent:** Friday, March 20, 2015 11:46 AM  
**To:** Head, Michael (KYOAG); Abshire, Ashley (EPSB)  
**Cc:** Ruble, Mary [KY]; JoEllen McComb (jsmccomb@brooksfirm.com); Brown, Bridget [KY]  
**Subject:** RE: stakeholder meeting re: draft disciplinary procedures regulation  
**Attachments:** Stakeholder Meeting Minutes with Janes comments.docx; Concerns about EPSB disciplinary process 03192015.docx

Michael and Ashley:

I have collected comments from JoEllen and Mary. JoEllen's comments are copied below. Some of JoEllen's comments refer to a document that Mary prepared. Therefore, I have attached Mary's document. (I understand that Mary is going to directly provide Michael with her lengthy summary of the meeting so I have not attached that summary to this email.) I added three marginal comments to Ashley's draft of the meeting minutes and request that those comments be considered in preparing the final draft. The minutes with the marginal comments are attached.

Thank you both for your hard work on this important project.

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All,

The Concerns Mary prepared are very well-stated, and I particularly concur with bullet points 5 and 14-16, and point number 8 under "things to remember."

Dennis – your comment [JD[2] – I do not recall Michael expressing the opinion that "obtaining statements ... from alleged witnesses may be needed," but he definitely identified that as a legal question as stated in the end of that paragraph. There was quite a bit of discussion on this, including MH's anecdotal story of a case for which he served as HO where the particulars of the preliminary investigation became a major issue that could not be definitively resolved due to lack of record regarding same. I believe there was a strong opinion from our stakeholder group that there should be no interviews with anyone other than the complainant at the preliminary inquiry stage.

I did not understand the "Consensus Reg Provisions / Comment" on the Abshire spreadsheet for stage: Formal Complaint: "All stakeholders agree that bringing charges back to the board after a hearing would slow the process and was not necessary."

JoEllen

*Dennis F. Janes*

Attorney at Law  
Kentucky Education Association  
401 Capital Avenue  
Frankfort, Kentucky 40601  
502-875-2889 or 800-231-4532, extension 335

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**From:** Head, Michael (KYOAG) [mailto:Michael.Head@ky.gov]  
**Sent:** Wednesday, March 18, 2015 9:52 AM  
**To:** Sneed, Alicia (EPSB); wayne@kasa.org; rjackson@elpolaw.com; Janes, Dennis [KY]; Ruble, Mary [KY]; Brown, Bridget [KY]; jsmccomb@brooksfirm.com

**Cc:** Brown, Robert L (EPSB); Abshire, Ashley (EPSB); Webb, Cassandra; O'Hair, Mary J ([mjohair@uky.edu](mailto:mjohair@uky.edu))

**Subject:** RE: stakeholder meeting re: draft disciplinary procedures regulation

All:

Thank you again for your input at the March 11 meeting. You have helped move forward the Board's effort to write a complaint and hearing procedures regulation for disciplinary action against certificate holders.

The Board's Executive Assistant, Ashley Abshire, has prepared two documents that capture the discussion at the meeting. These documents are attached. Based on my cursory review, I believe Ashley is to be commended for providing two excellent summaries.

At the same time, if anyone believes these good summaries should be supplemented or revised to better reflect the discussion at the meeting, please send your comments to Ashley by noon, Friday, March 20. Ashley will see that your comments are included in or with the final documents she sends to the Board members by COB that day. These documents will be considered by the Board at its special meeting on March 23.

Michael Head  
Assistant Attorney General  
Office of the Attorney General  
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### **Governing rules for the EPSB disciplinary process**

**Statute: KRS 161.120:** The statute sets out the specific reasons that a teacher may be disciplined by the EPSB. Other than requiring the superintendent to report an occurrence within 30 days and that the certificate holder must be given notice of the allegation and an opportunity to rebut, there is no description of the process or timelines by which discipline will occur.

**Regulation: 16 KAR 1:030:** Relates to disciplinary authority but does not establish a disciplinary process. Section 1 allows the EPSB to consider reports from any source. Section 2 sets requirements for reinstatement and reissuance of certificates. Section 3 allows an appeal from the denial of an application for a teaching or administrative certificate.

### **General concerns about the EPSB disciplinary process:**

**Transparency:** The EPSB disciplinary process is not transparent because all the information necessary to understand the process and the consequences of decisions made along the way is not readily available to teachers or the attorneys who represent them. For instance, there is nothing in the statute or regulation that requires teachers to respond to an EPSB letter within 30 days; instead, that requirement is established by board policy "Determining Probable Cause to Take Disciplinary Action Procedure." There is nothing in the statute or regulation that allows flagging certificates during the pendency of an investigation and permanently marking certificates with periods of suspension or revocation. Both actions were authorized by board motion, but were never even incorporated into a policy. These practices and many others possibly violate KRS 13A.100(d) and KRS 13A.130(2).

**Efficiency:** The EPSB disciplinary process is not efficient for two primary reasons: 1) because the reporting requirement in KRS 161.120 causes too many issues to be reported, and 2) because there are no timelines by which the EPSB must act once a report is received. Because there is no burden on the EPSB to act within any particular time frame at any of the many steps in the process, cases linger in the system much longer than is necessary or appropriate. Because the EPSB has no incentive to move cases along, teachers who are stuck in the system literally have no way out and often settle cases that would otherwise be challenged simply to draw the process to a close.

**Fairness:** The EPSB disciplinary process is not fair for the following reasons:

- Allegations of misconduct must be reported to the EPSB regardless of whether the superintendent believes that is necessary, even when the matter was relatively minor or was adequately remediated at the local level.
- There is no timeline by which the EPSB must inform the teacher that a report was made.
- Reports that are made but that do not result in an open case are not reported to the teacher at all, but are kept on file and may be added to the list of allegations in the event reports are made about the same teacher in the future. This is a clear violation of KRS 161.120(2)(d).
- There is only one person at the EPSB who determines whether a case will be opened or not.

- Once a case is opened, the staff attorneys are unwilling to recommend dismissal even if the investigation does not reveal any evidence of misconduct. Instead, they insist on imposing some discipline, even if it is just training.
- A teacher's certificate is flagged with "investigation pending" when the case is initially opened but before the teacher receives a copy of the complaint or has an opportunity to respond. Until recently, teachers were not informed that the certificate was flagged.
- The rule that a teacher has thirty (30) days to respond to the EPSB is not established by statute or regulation, but rather, is imposed on the teacher by EPSB policy.
- There is no timeline by which the EPSB must make an initial decision regarding the handling of a complaint after receiving the teacher's initial response.
- There is no timeline by which the EPSB must conclude its investigation of a complaint, even if a full investigation was previously made by law enforcement or another state agency or whether the facts were established by a tribunal hearing process pursuant to KRS 161.790.
- There is no timeline by which the EPSB must make its initial offer to settle a case.
- There is no timeline by which the EPSB must reply to a teacher's response to an offer of settlement.
- There is no timeline by which the EPSB must respond to a written demand for a hearing.
- Dismissals by the EPSB are not "with prejudice," meaning that the same allegations can be brought up again in the event unrelated reports about the same teacher are made in the future.
- Every period of suspension, no matter how short, is marked on the certificate FOREVER. Until very recently, teachers were not informed about this added consequence of accepting any period of suspension would have had no reason to know it will happen because it is not authorized by statute or regulation.
- Teachers who negotiated a period of suspension prior to 2004 (when the board policy re: marking went into effect) but whose certificates later expired and were renewed after 2004 had their certificates permanently marked with the period of suspension even though that consequence did not exist at the time they negotiated their agreement.
- There is currently no method to "expunge" the permanent mark on a certificate. Although the board does have a "waiver policy" that would theoretically allow the mark to be removed, no one has ever successfully petitioned the board and been granted a waiver for that purpose.
- EPSB staff considers a disciplinary case well managed if it is resolved within TWO (2) YEARS of the initial report. Even if the case is ultimately dismissed, the teacher's certificate has been flagged for the entire time, thereby impairing his or her ability to obtain employment anywhere other than the reporting district. At least half of the cases currently opened more than two years old.

Things to remember:

1. Disciplinary procedure timelines that are not established by statute can be established by regulation.
2. The EPSB can modify or revoke its own practices or policies at any time.
3. The practice of flagging certificates on a "closed" database only benefits potential employers. Most reports to the EPSB are made by the employing superintendent, who receives correspondence from the EPSB regarding the disposition of the case. Therefore, the employing superintendent obviously does not need a database to let him or her know that a report was made or whether that report resulted in an open case. Instead, the practice of flagging certificates only benefits potential employers. It is not within the EPSB's authority to perform human resources work for school districts.
4. The practice of flagging certificates on a closed database may violate the KY Open Records law because the information is not notice of a final action of the board. In fact, when the flag initially goes up, the board has not even considered the case at all; instead, the flag is a reflection of staff's opinion of the circumstances. At best, flagging a certificate at any point before the EPSB takes final action is an indication of a preliminary recommendation that is exempt from disclosure under KRS 61.878 (i) or (j) or both.
5. The practice of flagging certificates on a closed database unduly disadvantages the teacher throughout the disciplinary process because it holds the teacher hostage and eliminates any sense of urgency on the part of the EPSB staff.
6. EPSB records, including teacher discipline records, are subject to the Open Records law. With very few exceptions, any final action taken by the agency can be disclosed to any third party who makes an appropriate written request. There is no harm to the EPSB or the teaching profession by requiring a written Open Records request before final disciplinary information is released to a member of the public.
7. There is no harm to the EPSB by including disciplinary procedures in regulation, but there is significant harm to the teacher by not fully disclosing all aspects of the EPSB disciplinary process.
8. If the EPSB determines that a period of suspension or revocation is appropriate, whether by agreement or through a hearing process, then that period of time is itself the punishment. There is no need to permanently mark certificates with a period of suspension that has already been served. Doing so serves no purpose other than to continue to punish the teacher for having fully complied with the EPSB's determination of appropriate disciplinary action.
9. Where no timelines are established by statute or regulation, the EPSB can determine its own timelines. Where statutes or regulations establish minimum periods, the EPSB may allow more – but not less – time.



**OUTLINE FOR ANALYZING ADMINISTRATIVE COMPLAINT AND HEARING PROCEDURES**

1. Receipt of Informal Complaints.
  - a. How is an informal complaint submitted?
  - b. Is a response solicited from the accused before investigation or before formal charges?
  - c. Is a reply solicited from the complainant before investigation or before formal charges?
  - d. Are there deadlines for responding?
  - e. How is time for the deadlines calculated? *E.g.*, from receipt of Board notification or from date of letter?
2. Initial Review of Informal Complaints and Other Materials.
  - a. Who reviews informal complaints?
  - b. What is reviewed? *E.g.*, informal complaint; response; reply; other materials?
  - c. When does review take place?
  - d. Action that can be taken? *E.g.*, recommendation to Board; investigation; offers of settlement; charges; dismissal.
3. Authorizing Investigations.
  - a. Who authorizes an investigation of possible charges?
  - b. Who decides the scope of the investigation?
4. Reporting Results of Investigation.
  - a. To whom is the report submitted?
  - b. Is there a deadline for submitting report?
  - c. Can the legal staff or Board investigator request an extension of the time to report?
  - d. Protection of report from open records production and from discovery production?

5. Decision after Investigation.

- a. Who decides the action to be taken?
- b. What are the permissible actions? *E.g.*, recommendation to Board; further investigation; offers of settlement; charges; dismissal.

6. Charges/ Formal Complaint.

- a. Who decides what formal charges should be initiated, both as to facts and law?
- b. Who decides when charges are brought, *i.e.*, when a formal complaint is issued?
- c. Who decides when an administrative hearing is initiated, *i.e.*, a notice of hearing is issued?
- d. Is there a deadline by which formal charges must be initiated?
- e. Is a formal complaint public or private?
- f. Is there a procedure for emergency action?

7. Case procedures.

- a. Is there Board or Board committee oversight of legal staff prosecution of cases?
- b. Are there hearing procedures that supplement KRS Chapter 13B procedures? *E.g.*, response to formal charges; deadline for hearing to be held; deadline for decision after a hearing; right to file a response to exceptions.

**LIST OF OTHER BOARDS' COMPLAINT PROCEDURE REGULATIONS**

201 KAR 2:061	Ky Board of Pharmacy
201 KAR 7:100	Ky Board for Specialists in Hearing Instruments
201 KAR 9:081	Ky Board of Medical Licensure
201 KAR 11:190	Ky Real Estate Commission
201 KAR 16:060	Ky Board of Veterinary Examiners
201 KAR 17:070	Ky Board of Speech-Language Pathology and Audiology
201 KAR 18:220	Ky Board of Licensure for Professional Engineers and Land Surveyors*
201 KAR 20:161	Ky Board of Nursing*
201 KAR 21:051	Ky Board of Chiropractic Examiners
201 KAR 22:052	Ky Board of Physical Therapy
201 KAR 25:051	Ky Board of Podiatry
201 KAR 26:130	Ky Board of Examiners of Psychologists*
201 KAR 28:150	Ky Board of Occupational Therapy
201 KAR 29:030	Ky Board of Respiratory Care
201 KAR 30:070	Ky Real Estate Appraisers Board
201 KAR 31:090	Ky Board of Registration for Professional Geologists
201 KAR 32:070	Ky Board of Licensure for Marriage and Family Therapists*
201 KAR 33:050	Ky Board of Licensure and Certification for Dietitians and Nutritionists
201 KAR 34:050	Ky Board of Licensure for Professional Art Therapists
201 KAR 35:060	Ky Board of Certification of Alcohol and Drug Counselors
201 KAR 36:050	Ky Board of Licensed Professional Counselors
201 KAR 39:100	Ky Board of Interpreters for the Deaf and Hard of Hearing
201 KAR 42:050	Ky Board of Licensure for Massage Therapy
201 KAR 43:060	Ky Applied Behavior Analysis Licensing Board
201 KAR 44:070	Ky Board of Prosthetics, Orthotics, and Pedorthics
201 KAR 45:150	Ky Board of Licensed Diabetes Educators
201 KAR 46:090	Ky Board of Medical Imaging and Radiation Therapy*

**201 KAR 18:220. Administrative hearings.**

RELATES TO: KRS 13B, 322.290(4)

STATUTORY AUTHORITY: KRS 13B.170(1), 322.290(4)

**NECESSITY, FUNCTION, AND CONFORMITY:** KRS 322.290(4) requires the board to promulgate administrative regulations to carry out the conduct of proceedings before it. KRS 13B.170(1) authorizes the board to promulgate administrative regulations necessary to carry out the provisions of that chapter. This administrative regulation establishes procedural guidelines for administrative hearings as authorized by KRS 322.290(4) and 13B.170(1).

**Section 1. Definitions.** (1) "Action" means a charge brought pursuant to this administrative regulation and KRS Chapter 13B.

(2) "Administrative complaint" means a written accusation filed by the board's general counsel with the board and with the Office of the Attorney General, Administrative Hearings Division alleging a violation by a licensee of KRS Chapter 322 or a provision of 201 KAR Chapter 18.

(3) "Administrative hearing" or "hearing" is defined by KRS 13B.010(2).

(4) "Board" means the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors.

(5) "Charge" means a written accusation of a violation of a provision of KRS Chapter 322 or of 201 KAR Chapter 18, contained in an administrative complaint.

(6) "Consent decree" means an order entered by the board with the agreement of a respondent.

(7) "Default" means a failure of a respondent to file an answer to an administrative complaint, to attend or participate in a prehearing conference, hearing, or other stage of the administrative hearing process, or to comply with the orders of a hearing officer.

(8) "Division" is defined by KRS 13B.010(8).

(9) "Final order" is defined by KRS 13B.010(6).

(10) "Hearing officer" is defined by KRS 13B.010(7).

(11) "Investigation review advisor" means a present or former member of the board, selected by the board chairman in consultation with the executive director, to independently review an investigation and provide the executive director with his or her opinion as to the propriety of filing an administrative complaint against the subject of the investigation, and to make suggestions regarding the nature of the charges, the appropriate penalty, and terms for settlement.

(12) "Letter of complaint" means a factual statement made in writing, by a person or organization, to the board, alleging a possible violation of a provision of KRS Chapter 322 or 201 KAR Chapter 18.

(13) "Licensee" means an individual or business entity licensed to practice engineering or land surveying in this Commonwealth pursuant to KRS Chapter 322.

(14) "Notice" means a notice of administrative hearing satisfying the requirements of KRS 13B.050(3).

(15) "Party" is defined by KRS 13B.010(3).

(16) "Respondent" means a licensee who is the subject of an investigation by the board for a violation of KRS Chapter 322 or 201 KAR Chapter 18.

(17) "Settlement conference" means a conference between board staff and a respondent and his or her attorney, if any, to attempt to resolve matters raised in an administrative complaint or charge.

(18) "Violation" means an act or failure to act that is in conflict with a provision of KRS Chapter 322 or 201 KAR Chapter 18.

**Section 2. Letter of Complaint, and Investigation.** (1) A letter of complaint shall be in writing, be signed by the individual making the allegations, and shall allege facts showing why that individual believes that a violation has occurred.

(2) An investigation shall be made of every complaint.

(3) An investigation may also be made without the receipt of a letter of complaint if information within the knowledge of the board or board staff indicates that a violation may have been committed.

**Section 3. Disposition Following Investigation.** (1) Following the completion of the investigation, if it appears to the executive director that no violation has occurred, or that the matter does not warrant further action, the executive director shall terminate any further proceedings and the matter shall be closed.

(2) If, following the completion of the investigation, it appears to the executive director that the respondent may have committed one (1) or more violations sufficient to warrant a charge or charges against that licensee, then to resolve the matter, the executive director shall:

(a) Issue a letter of admonishment to the respondent;

(b) Negotiate a proposed consent decree with the respondent, which shall, after execution by the respondent, be presented to the board for approval or rejection; or

(c) Cause an administrative complaint to be filed.

(3) If a proposed consent decree is rejected by the board, the executive director shall either try to resolve the matter with another proposed consent decree, or shall proceed with an administrative complaint;

(4) The board may enter into a settlement conference following the completion of the investigation.

(5) Prior to causing an administrative complaint to be filed, the executive director may request that the board chairman designate one (1) or two (2) investigative review advisors who shall independently review the investigation, and shall submit to the executive director, their independent opinions as to the propriety of filing an administrative complaint against the subject of the investigation, and suggestions regarding the nature of the charges, the appropriate penalty, and terms for settlement.

(6) A former board member who serves as an investigative review advisor shall be compensated at the same rate as provided for a board member who so serves.

(7) A board member who serves as an investigative review advisor for a specific disciplinary action, shall not thereafter participate in the determination of a final order in that same action, except that he or she may participate in the consideration of a proposed consent decree.

(8) An individual who has filed a letter of complaint shall be notified of the disposition of the subject matter upon its resolution.

**Section 4. Administrative Complaints.** An administrative complaint shall be in plain language in the pleading form used in the circuit courts of this Commonwealth and shall be signed by the board's general counsel.

**Section 5. Actions.** (1) An action shall be commenced by sending notice and a copy of the administrative complaint to the licensee at the address for the licensee on file with the board, with a copy to the Office of the Attorney General, Hearing Officer Division consistent with the provision of KRS Chapter 13B.

(2) The board shall file proof of notice with the hearing officer.

(3) Within twenty (20) days of notice, a respondent shall file an answer with the board and with the hearing officer.

(4) The hearing shall be conducted according to the provisions of KRS Chapter 13B.

Section 6. Default. A default shall be deemed a confession of all material allegations contained in the administrative complaint.

Section 7. Amended Pleadings. (1) A party, as a matter of right, may amend a pleading.

(a) A pleading shall not be amended later than thirty (30) days before a scheduled hearing.

(b) A party seeking to amend a pleading within a period less than thirty (30) days before a scheduled hearing shall amend a pleading only by consent of the adverse party or by leave of the hearing officer, and leave shall be freely given if justice so requires.

(2) If an amended pleading introduces new legal or factual issues that cannot reasonably be met by the opposing party prior to the scheduled hearing, the hearing officer shall continue the hearing.

Section 8. Final Order and Consent Decree. (1) If an administrative complaint has been filed, and the matter resolved by means of a consent decree, the consent decree entered by the board is a final order as established by KRS Chapter 13B.

(2) A consent decree shall not be binding on the parties until approved by the board.

(3) If a final order or consent decree provides that the executive director shall suspend or revoke a license for failure of the licensee to comply with the terms of the final order or consent decree, the executive director shall suspend or revoke the license for failure to comply according to the terms of the final order or consent decree.

(4) If a final order or consent decree does not include a provision for suspension or revocation of a license for the licensee's failure to comply with the terms of the final order or consent decree, and the executive director has probable cause to believe that a respondent has violated the terms of a final order or consent decree, the executive director shall cause a show cause order, over the signature of the board's general counsel, to be issued to the respondent, with a copy to the Office of the Attorney General, Hearing Officer Division.

(5) The show cause order shall meet the requirements of a notice and shall be treated as an administrative complaint for procedural purposes.

Section 9. Publication. At least annually, a summary of all final orders and consent decrees shall be published. (30 Ky.R. 1705; Am. 1925; eff. 2-16-2004; 38 Ky.R. 1991; eff. 8-31-2012.)

**201 KAR 20:161. Investigation and disposition of complaints.**

RELATES TO: KRS Chapter 13B, 218A.205, 314.011, 314.031, 314.071(4), 314.091, 314.107, 314.470, 314.991(3)

STATUTORY AUTHORITY: KRS 218A.205, 314.131(1)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 314.131(1) authorizes the Board of Nursing to promulgate administrative regulations to effect the provisions of KRS Chapter 314. This administrative regulation establishes the procedures for the investigation and disposition of complaints received by the board.

**Section 1. Receipt of Complaints.** (1) The board shall receive and process each complaint made against a licensee, holder of a multistate licensure privilege pursuant to KRS 314.470, or applicant or unlicensed individual if the complaint alleges acts that may be in violation of the provisions of KRS Chapter 314.

(2)(a) A complaint shall be in writing and shall be dated and fully identify the individual by name.

(b) The president of the board or the executive director or designee shall file a complaint based upon information received by oral, telephone, or written communications if the facts of the complaint are found to be accurate and indicate acts that may be in violation of the provisions of KRS Chapter 314.

(3) A certified copy of a court record for a misdemeanor or felony conviction or a certified copy of disciplinary action in another jurisdiction shall be considered a valid complaint.

(4) A complaint shall be investigated.

(a) If the complaint establishes a potential violation or the conduct falls within the statutory instances which shall be investigated, the board shall send a copy of the complaint to the licensee, holder of a multistate privilege, or applicant to the address of record.

(b) A written, legible, verified response shall be filed with the board within thirty (30) days of receipt by the individual against whom the complaint has been made.

(c) The staff may request an informal conference with the individual against whom the complaint has been made.

(5)(a) A complaint shall be evaluated to find if a violation of the provisions of KRS Chapter 314 has been alleged.

(b) The credentials review panel or the executive director or designee shall make the determination as to the disposition of the complaint pursuant to Section 2 of this administrative regulation.

(6)(a) All preliminary information shall be treated as confidential during the investigation and shall not be disclosed to board members or to the public, except as provided by KRS 314.470. The board shall make available to the public the fact that an investigation is pending.

(b) If a board member has participated in the investigation or has substantial knowledge of facts prior to a hearing on the complaint that may influence an impartial decision by the member, that member shall not participate in the adjudication of the complaint.

(7)(a) When the board receives a report of improper, inappropriate, or illegal prescribing or dispensing of a controlled substance by an advanced practice registered nurse (APRN), it shall notify, within three (3) business days:

1. The Department of Kentucky State Police;
2. The Office of the Attorney General; and
3. The Cabinet for Health and Family Services, Office of the Inspector General.

(b) An investigation concerning a complaint filed against an APRN pertaining to the improper, inappropriate, or illegal prescribing or dispensing of controlled substances shall be commenced within seven (7) days of the filing of the complaint.

(c) The investigation shall be completed and a determination as to the disposition of the complaint shall be made within 120 days of the receipt of the complaint, unless an extension of time is requested by a law enforcement agency due to an ongoing criminal investigation.

**Section 2. Disposition of Complaints.** (1) Disposition of complaints shall be as follows:

(a) If there is a determination by the executive director or designee that there is insufficient evidence of a violation or that a violation has not occurred, there shall not be further action unless warranted by future evidence;

(b)1. The complaint may be referred to the credentials review panel of the board by the executive director or designee for disposition pursuant to this section or for issuance of a letter of concern; or

2. It may be found that there is probable cause that a violation of KRS 314.091 has occurred.

(c) In cases involving practice as a nurse on the privilege pursuant to KRS 314.470, the case may be referred to the home state.

(2) Upon determination that there is probable cause that a violation of KRS 314.091 has occurred, the complaint shall be handled as follows:

(a) An administrative hearing may be scheduled pursuant to subsection (3) of this section;

(b) An agreed order may be offered pursuant to subsection (4) of this section; or

(c) A consent decree may be offered, pursuant to subsection (5) of this section.

(3) Administrative hearings.

(a) Hearings shall be held pursuant to KRS 314.091, Chapter 13B, and 201 KAR 20:162.

(b) Notice of the hearing and charges shall be mailed by certified mail to the address of the licensee or applicant on file with the board pursuant to KRS 314.107.

(c) Notice of the hearing and charges shall be signed by the executive director or designee.

(4) Agreed order.

(a) The board may enter into an agreement with an individual for denial, revocation, voluntary surrender, suspension, probation, reinstatement, limitation of license or reprimand, and to impose a civil penalty, if the individual agrees to waive the right to a hearing. The terms of the agreement may include other conditions or requirements to be met by the individual, including those listed in Section 4 of this administrative regulation.

(b) The agreed order may contain terms that ensure protection of public health and safety or that serve to educate or rehabilitate the individual.

(c) The agreed order, if approved by the board, shall terminate the investigation of a specific complaint.

(d) If the agreed order is not approved by the board, charges may be brought pursuant to KRS 314.091, and the matter shall be resolved as directed therein.

(5) Consent decree.

(a) If an individual agrees to waive the right to a hearing, the board may issue a consent decree in accordance with the provisions of KRS 314.991 to impose a civil penalty and other terms and conditions as listed in Section 4 of this administrative regulation against an individual who has:

1. Practiced as a nurse in the Commonwealth of Kentucky without a temporary work permit, multistate licensure privilege pursuant to KRS 314.470, or a current license or provisional license issued by the board;
2. Practiced as an advanced practice registered nurse in the Commonwealth of Kentucky without current licensure issued by the board prior to filing an application for licensure;
3. Practiced as an advanced practice registered nurse after expiration of the current certification granted by the appropriate national

organization or agency;

4. Cured noncompliance with continuing education requirements, as established in 201 KAR 20:215, Section 3;
5. Executed an affidavit of reasonable cause concerning the AIDS education requirement and obtained the required education after the expiration of the six (6) months;
6. Tested positive on a drug screen for a nonprescribed drug or illicit substance and obtained a chemical dependency evaluation that does not indicate a diagnosis of chemical dependency;
7. Failed to report a criminal conviction or disciplinary action against any professional license or credential in Kentucky or in another jurisdiction on an application;
8. Committed a substandard nursing act where:
  - a. The continuing practice by the nurse does not pose a risk of harm to the client or another;
  - b. The potential risk of physical, emotional, or financial harm to the client due to the incident is minimal;
  - c. The nurse subsequently exhibits a conscientious approach to and accountability for his or her practice; and
  - d. The nurse subsequently has demonstrated the knowledge and skill to practice safely; or
9. As an advanced practice registered nurse (APRN) with a Collaborative Agreement for Prescriptive Authority for Controlled Substances (CAPA-CS):
  - a. Failed to register with KASPER;
  - b. Failed to report a DEA registration number to the board; or
  - c. Failed to notify the board of the CAPA-CS.
    - (b) The issuance of a consent decree shall be restricted to only those individuals described in paragraph (a) of this subsection who have not previously been issued a consent decree for the same or substantially similar violation and who have not violated any other provision of KRS Chapter 314 or any other laws of the Commonwealth of Kentucky or of the United States.
    - (c) The license may be issued by board staff after the individual meets all requirements for licensure upon ratification of the consent decree by the board.
    - (d) Upon ratification by the board of the consent decree, the investigation of the specific complaint shall be terminated.
    - (e) If the consent decree is not ratified by the board, charges may be brought pursuant to KRS 314.091, and the matter shall be resolved as directed therein.
    - (f) Consent decrees that have been ratified by the board shall not be reported to other state boards of nursing, the national council of state boards of nursing, or other organizations, unless required by law.
- (6) Special standards for an Advanced Practice Registered Nurse (APRN) with a Collaborative Agreement for Prescriptive Authority for Controlled Substances (CAPA-CS).
  - (a) An APRN licensed in Kentucky or an applicant for licensure in Kentucky who has been convicted of any felony offense after July 20, 2012 relating to controlled substances in any state shall be permanently banned from prescribing controlled substances.
  - (b) An APRN licensed in Kentucky or an applicant for licensure in Kentucky who has been convicted of any misdemeanor offense after July 20, 2012 relating to prescribing or dispensing controlled substances in any state shall have their authority to prescribe controlled substances suspended for at least three (3) months and further restricted as established by the board.
  - (c) The board shall mirror in time and scope any disciplinary limitation placed on an APRN licensed in Kentucky by a licensing board of another state if the disciplinary action resulted from improper, inappropriate, or illegal prescribing or dispensing of controlled substances.
  - (d) An applicant for licensure in Kentucky as an APRN who has disciplinary action by a licensing board of another state which resulted from improper, inappropriate, or illegal prescribing or dispensing of controlled substances shall have his or her application denied.
  - (e) Cases that come under KRS 314.011(21)(c) shall not be considered convictions for the purpose of this subsection.

Section 3. The executive director or designee shall notify the complainant and the person against whom the complaint was made of the final disposition of the case.

Section 4. The restrictions or conditions imposed by the board on a temporary work permit, holder of a multistate licensure privilege, or license or provisional license may include the following:

- (1) Prohibiting the performance of specific nursing acts including access to, responsibility for, or the administration of controlled substances; administration of medication; supervisory functions; or any act that the individual is unable to safely perform;
- (2) Requiring the individual have continuous, direct, on-site supervision by a licensed nurse, physician, or dentist;
- (3) Specifying the individual's practice setting;
- (4) Specifying the types of patients to whom the individual may give nursing care;
- (5) Requiring the individual to notify the board in writing of a change in name, address, or employment;
- (6) Requiring the individual to have his or her employer submit to the board written reports of performance or compliance with the requirements established by the board;
- (7) Requiring the individual to submit to the board evidence of physical or chemical dependency, mental health evaluations, counseling, therapy, or drug screens;
- (8) Meeting with representatives of the board;
- (9) Issuing the license or temporary work permit for a specified period of time;
- (10) Requiring the individual to notify the board in writing of criminal arrests, charges, or convictions;
- (11) Requiring the individual to be employed as a nurse for a specified period of time; or
- (12) Requiring the individual to complete continuing education in a specific subject.

Section 5. Anonymous Complaints. Section 1(2)(a) of this administrative regulation notwithstanding, the board shall accept an anonymous complaint if the complaint is accompanied by sufficient corroborating evidence as would allow the board to believe, based upon a totality of the circumstances, that a reasonable probability exists that the complaint is meritorious.

Section 6. In accordance with federal law, the board shall submit all disciplinary actions to the National Practitioner Data Bank of the United States Department of Health and Human Services either directly or through a reporting agent. (11 Ky.R. 1694; eff. 6-4-1985; Am. 14 Ky.R. 578; 1068; eff. 11-6-1987; 2192; eff. 8-5-1988; 15 Ky.R. 838; eff. 10-14-1988; 17 Ky.R. 2758; eff. 4-11-1991; 19 Ky.R. 2667; 20 Ky.R. 304; eff. 8-6-1993; 32 Ky.R. 292; 620; eff. 10-19-2005; 33 Ky.R. 863; 1288; eff. 11-15-2006; 34 Ky.R. 2341; 2527; eff. 6-18-2008; 35 Ky.R. 1505; eff. 2-18-2009; 36 Ky.R. 1978; eff. 5-7-2010; TAm eff. 7-15-2010; 38 Ky.R. 297; 10-19-11; 39 Ky.R. 538; eff. 2-1-2013; 40 Ky.R. 2602; 41 Ky.R. 22; eff. 8-1-2014.)

**201 KAR 26:130. Complaint procedure.**

RELATES TO: KRS 319.005, 319.082, 319.118, 319.990

STATUTORY AUTHORITY: KRS 319.032

NECESSITY, FUNCTION, AND CONFORMITY: KRS 319.005 prohibits unlicensed persons from engaging in the practice of psychology or using the title of psychologist, licensed psychologist, certified psychologist, licensed psychological practitioner or licensed psychological associate. KRS 319.082 delineates the causes for which disciplinary action may be taken against a licensed holder. KRS 319.118 authorizes the board to institute and maintain actions to restrain or enjoin violations. KRS 319.990 sets forth the criminal penalty for violations and authorizes prosecution of violators. KRS 319.032 authorizes the board to develop guidelines for use in complaints involving alleged sexual misconduct by a licensed holder, and for training of investigators in these matters. This administrative regulation is established to protect and safeguard the health and safety of the citizens of Kentucky and to provide procedures for filing, evaluating, and disposing of complaints.

Section 1. Definitions. (1) "Act" means Chapter 319 of the Kentucky Revised Statutes.

(2) "Board" is defined in KRS 319.010(2), and for purposes of this administrative regulation, shall also refer to a hearing panel.

(3) "Charge" means a specific allegation contained in any document issued by the board or hearing panel alleging a violation of a specified provision of the KRS Chapter 319 or the administrative regulations promulgated thereunder.

(4) "Formal complaint" means a formal administrative pleading authorized by the board that sets forth charges against a licensed holder or applicant and commences a formal disciplinary proceeding in accordance with KRS Chapter 13B.

(5) "Initiating complaint" means any allegation alleging misconduct by a licensed holder or applicant or alleging that an unlicensed person is engaging in the practice of psychology or using the title of psychologist.

(6) "Order" means the whole or any part of a final disposition of a hearing.

(7) "Person" means any individual, partnership, corporation, association, or public or private organization of any character other than an agency.

(8) "Presiding officer" means the person appointed by the board to preside at a hearing pursuant to KRS 319.032(1)(h), and shall include either a hearing officer or a member of the hearing panel.

(9) "Respondent" means the person against whom an initiating or a formal complaint has been made.

Section 2. Initiating Complaint. (1) Source of initiating complaint. A complaint may be initiated by the board, by the public or by any governmental agency. A certified copy of a court record for a misdemeanor or felony conviction relating to the practice of psychology shall be considered a valid complaint.

(2) Form of initiating complaint. Initiating complaints shall be in writing and shall clearly identify the person against whom the complaint is being made. Further, the complaint shall contain the date, and shall identify by signature the person making the complaint, and shall contain a clear and concise statement of the facts giving rise to the complaint.

(3) Receipt of initiating complaint. A complaint may be received by any board member, credential holder designated by the board, by the Office of the Attorney General, or by any staff member.

(4) Reply of respondent. A copy of the initiating complaint shall be mailed to the respondent. The respondent shall file with the board a written response to the initiating complaint within fifteen (15) days of the date on which the initiating complaint was mailed.

(5) Consideration of initiating complaint. At the next regularly-scheduled meeting of the board or as soon thereafter as practicable, the board or a panel of the board shall review the initiating complaint and response. At that time, the board shall determine if an investigation is warranted, and if so, the board may appoint one (1) of its members or any agent or representative of the board to conduct an investigation of the complaint.

(6)(a) If there is reasonable cause to believe that a license holder or applicant for a license is physically or mentally incapable of practicing psychology with reasonable skill and safety to clients, the board may order the license holder or applicant to submit to an examination by a psychologist or a physician designated by the board to determine the license holder's or applicant's psychological or physical status to practice psychology.

(b) The expense of this examination shall be borne by the board.

(c) The board shall then consider the findings and conclusion of the examination and the final investigative report at its next regularly-scheduled meeting or soon thereafter.

(7) Investigation.

(a) The person about whom the initiating complaint has been considered shall be contacted. With the consent of the respondent, a meeting may be scheduled at which time he or she may respond further to the allegations of the initiating complaint. The board and the respondent shall have the right to be represented at the meeting by legal counsel.

(b) Report of investigation. Upon the completion of the investigation, the person or persons making that investigation shall submit a written report to the board containing a succinct statement of the facts disclosed by the investigation.

(c) Consideration of complaint and investigative report. Based on consideration of the complaint, the investigative report, if any, and the psychological or physical examination, if any, the board shall determine if there has been a prima facie violation of the Act. If the investigator is a member of the board, he or she shall not vote. If it is determined that the facts alleged in the complaint or investigative report do not constitute a prima facie violation of the statute or administrative regulations, the board shall notify the person making the complaint and the respondent that no further action shall be taken at the present time. If it is determined that there is a prima facie violation of KRS 319.082 or administrative regulations, the board shall issue a formal complaint against the license holder or applicant. In the case of a prima facie violation of KRS 319.005, the board shall file suit to enjoin the violator or shall seek criminal prosecution pursuant to KRS 319.990.

Section 3. Formal Complaint. If the board determines that the initiating complaint shall be made a formal complaint, the following actions shall be initiated:

(1) Issuance of formal complaint. The board shall provide the respondent with a written formal complaint which shall set forth:

(a) Each offense charged;

(b) Notice of the respondent's right to be represented by counsel;

(c) Notice of the respondent's right to subpoena witnesses in the respondent's behalf; and

(d) Notice of the respondent's right to appeal after an adverse adjudication.

(2) Service of formal complaint. Service of process shall be provided in accordance with KRS 13B.050(2).

(3) Issuance of hearing notice. Notice of the hearing shall be provided as required by KRS 13B.050(1) and (3).

Section 4. Formal Response. Within twenty (20) days of service of the formal complaint, the respondent shall file with the board a written response to the specific allegations set forth in the formal complaint. Allegations not properly responded to shall be deemed admitted. The board may, for good cause, permit the late filing of a response.



Section 5. Allegations of Sexual Misconduct by a License Holder. (1) To assure confidentiality for the complainant, the alleged victim's name shall not be used in any written document. This individual shall be identified by initials only or by some other mechanism adopted by the board for identification.

(2) Upon request, the testimony of the alleged victim may be taken by deposition in order to assure his or her confidentiality.

(3) To protect the confidentiality of all parties, the board may issue an order restraining all parties and their representatives, including counsel, from any discussion or release of information about the allegations outside of the investigative and hearing processes.

(4) In accordance with the provisions of KRS 319.032(1)(d), the board may hold some or all of the hearing procedures in closed session.

Section 6. Board Member Training for Cases of Sexual Misconduct. (1) Within six (6) months of their appointment, all board members and investigators shall undergo specialized training to cover the content specified by KRS 319.032(1)(e).

(2) No investigator shall be assigned to cases where sexual misconduct has been alleged until such training has been completed.

(3) Training shall consist of a three (3) hour course which includes the content specified by KRS 319.032 and may be delivered by means of either live presentation, individual tutorial, or videotape. (13 Ky.R. 2162; eff. 7-2-87; Am. 20 Ky.R. 579; 933; eff. 10-21-93; 28 Ky.R. 1459; 1802; eff. 2-7-2002; 37 Ky.R. 1516; 1977; eff. 3-4-2011.)

**201 KAR 32:070. Complaint procedure.**

RELATES TO: KRS 335.305(1), 335.348, 335.350, 335.399

STATUTORY AUTHORITY: KRS 335.320(9), 335.325

NECESSITY, FUNCTION, AND CONFORMITY: KRS 335.320(9) requires the Kentucky State Board of Licensure for Marriage and Family Therapists to promulgate administrative regulations to implement KRS Chapter 335. This administrative regulation establishes procedures for the filing, evaluation, and disposition of administrative complaints.

Section 1. Definitions. (1) "Chairman" means the chairman or vice-chairman of the board.

(2) "Charge" means a specific allegation contained in a formal complaint, as defined in subsection (5) of this section, issued by the board alleging a violation of a specified provision of KRS Chapter 335 or 201 KAR Chapter 32.

(3) "Complaint" means a written allegation of misconduct by a credentialed individual or other person that may constitute a violation of KRS Chapter 335 or 201 KAR Chapter 32.

(4) "Complaint screening committee" means a committee consisting of three (3) persons on the board appointed by the chairman of the board to review complaints, investigative reports, and to participate in informal proceedings to resolve a formal complaint, and in addition to board members, the executive director of the board or another staff member may be appointed to serve on this committee.

(5) "Formal complaint" means a formal administrative pleading authorized by the board that charges a licensed individual or other person with an alleged violation and commences a formal disciplinary proceeding pursuant to KRS Chapter 13B or requests the court to take criminal or civil action.

(6) "Informal proceedings" means the proceedings instituted at any stage of the disciplinary process with the intent of reaching a dispensation of any matter without further recourse to formal disciplinary procedures under KRS Chapter 13B.

(7) "Investigator" means an individual designated by the board to assist the board in the investigation of a complaint or an investigator employed by the Attorney General or the board.

Section 2. Receipt of Complaints. (1) A complaint:

(a) May be submitted by an:

1. Individual;
2. Organization; or
3. Entity;

(b) Shall be:

1. In writing using the Complaint Form and Instructions; and
2. Signed by the person offering the complaint; and
- (c) May be filed by the board based upon information in its possession.

(2) Upon receipt of a complaint:

(a)1. A copy of the complaint shall be sent to the individual named in the complaint along with a request for that individual's response to the complaint.

2. The individual shall have a period of twenty (20) days from the date of receipt to submit a written response.

(b)1. Upon receipt of the written response of the individual named in the complaint, a copy of the response shall be sent to the complainant.

2. The complainant shall have seven (7) days from the receipt to submit a written reply to the response.

Section 3. Initial Review. (1)(a) After the receipt of a complaint and the expiration of the period for the individual's response, the complaint screening committee shall consider the individual's response, complainant's reply to the response, and any other relevant material available and make a recommendation to the board.

(b) The board shall determine whether there is enough evidence to warrant a formal investigation of the complaint.

(2) If the board determines before formal investigation that a complaint is without merit, it shall:

- (a) Dismiss the complaint; and
- (b) Notify the complainant and respondent of the board's decision.
- (3) If the board determines that a complaint warrants a formal investigation, it shall:
  - (a) Authorize an investigation into the matter; and
  - (b) Order a report to be made to the complaint screening committee.

Section 4. Results of Formal Investigation; Board Decision on Hearing. (1) Upon completion of the formal investigation, the investigator shall submit a report to the complaint screening committee of the facts regarding the complaint.

(a) The committee shall review the investigative report and make a recommendation to the board.

(b) The board shall determine whether there has been a violation of KRS Chapter 335 or 201 KAR Chapter 32 and a complaint shall be filed.

(2) If the board determines that a complaint does not warrant issuance of a formal complaint, it shall:

- (a) Dismiss the complaint; and
- (b) Notify the complainant and respondent of the board's decision.
- (3) If the board determines that a violation has occurred but is not serious, the board shall issue a written admonishment to the licensee.
- (a) A copy of the written admonishment shall be placed in the permanent file of the licensee.

(b)1. The licensee shall have the right to file a response in writing to the admonishment within thirty (30) days of its receipt and may have it placed in his permanent file.

2.a. Alternatively, the licensee may file a request for a hearing with the board within thirty (30) days of the admonishment.

b. Upon receipt of the request, the board shall set aside the written admonishment and set the matter for hearing pursuant to the provisions of KRS Chapter 13B.

(4) If the board determines that a complaint warrants the issuance of a formal complaint against a respondent, the complaint screening committee shall prepare a formal complaint that states clearly the charge or charges to be considered at the hearing.

(a) The formal complaint shall be reviewed by the board and, if approved, signed by the chairman and served upon the individual as required by KRS Chapter 13B.

(b) The formal complaint shall be processed in accordance with KRS Chapter 13B.

(5) If the board determines that a person may be in violation of KRS 335.305(1), it shall:

(a) Order the individual to cease and desist from further violations of KRS 335.305(1);

(b) Forward information to the county attorney of the county of residence of the person allegedly violating KRS 335.305(1) with a request that appropriate action be taken pursuant to KRS 335.399; or

(c) Initiate action in Franklin Circuit Court for injunctive relief to stop the violation of KRS 335.305(1).

Section 5. Settlement by Informal Proceedings. (1) The board through counsel and the complaint screening committee may, at any time during this process, enter into informal proceedings with the individual who is the subject of the complaint for the purpose of appropriately dispensing with the matter.

(2) An agreed order or settlement reached through this process shall be approved by the board and signed by the individual who is the subject of the complaint and the chairman.

(3) The board may employ mediation as a method of resolving the matter informally.

Section 6. Notice and Service of Process. A notice required by KRS Chapter 335 or this administrative regulation shall be issued pursuant to KRS Chapter 13B.

Section 7. Notification. The board shall make public:

(1) Its final order in a disciplinary action pursuant to KRS 335.350 with the exception of a written admonishment issued pursuant to Section 4(3) of this administrative regulation; and

(2) An action to restrain or enjoin a violation of KRS 335.305(1).

Section 8. Incorporation by Reference. (1) "Complaint Form and Instructions", 2009, is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Division of Occupations and Professions, 911 Leawood Drive, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. (28 Ky.R. 189; Am. 562; eff. 9-10-2001; 35 Ky.R. 1867; 2417; eff. 6-5-09.)

**201 KAR 46:090. Complaint Process and Administrative Hearings.**

RELATES TO: KRS 311B.050, 311B.100, 311B.120, 311B.150, 311B.160, 311B.170, 311B.180, 311B.190

STATUTORY AUTHORITY: KRS 311B.050(1), (2), (7), 311B.120, 311B.170, 311B.180, 311B.190

NECESSITY, FUNCTION, AND CONFORMITY: KRS 311B.050(1) and (2) require the Board of Medical Imaging and Radiation Therapy to promulgate administrative regulations to administer and enforce the chapter. KRS 311B.050(7) requires the board to investigate violations of the chapter, conduct hearings, resolve allegations, and to impose sanctions or penalties if appropriate. KRS 311B.120, 311B.180, and 311B.190 require the board to promulgate administrative regulations to establish and assess penalties and fees. KRS 311B.170 requires the board to provide an administrative hearing process for a violation of KRS Chapter 311B. KRS Chapter 13B establishes a uniform procedure to be followed by administrative agencies in conducting agency hearings. This administrative regulation establishes, consistent with the requirements of KRS Chapter 13B, the procedures to be followed by the board in hearing appeals of actions taken under the public health laws of the Commonwealth.

**Section 1. Receipt of Complaints. (1) A complaint:**

(a) May be submitted by an:

1. Individual;
2. Organization; or
3. Entity;

(b) Shall be:

1. In writing; and
2. Signed by the person offering the complaint; and

(c) May be filed by the board based upon information in its possession.

(2)(a) Upon receipt of a complaint, a copy of the complaint shall be sent to the individual named in the complaint along with a request for that individual's response to the complaint.

(b) The individual shall be allowed a period of twenty (20) days from the date of receipt to submit a written response.

(c) The board shall evaluate the date of receipt based upon the postmark date, or, if not sent through the mail, the date hand stamped on the complaint.

(3)(a) Upon receipt of the written response of the individual named in the complaint, a copy of the response shall be sent to the complainant.

(b) The complainant shall have seven (7) days from receipt of the response to submit a written reply to the response.

(c) The board shall evaluate the date of receipt based upon the postmark date or, if not sent through the mail, the date hand stamped on the response.

**Section 2. Initial Review. (1)** After the receipt of a complaint and the expiration of the period for the individual's response, the complaint screening committee shall consider the individual's response, complainant's reply to the response, and any relevant material available and make a recommendation to the board.

(a) The names of the individuals and other identifying information shall be redacted to provide anonymity.

(b) The board shall find whether there is enough evidence to warrant a formal investigation of the complaint.

(2) If the board finds before formal investigation that a complaint is without merit, it shall:

(a) Dismiss the complaint; and

(b) Notify the complainant and respondent of the board's decision.

(3) If the board finds that a complaint warrants a formal investigation, it shall:

(a) Authorize an investigation into the matter; and

(b) Order a report to be made to the complaint screening committee at the earliest opportunity.

**Section 3. Results of Formal Investigation; Board Decision on Hearing. (1)** Upon completion of the formal investigation, the investigator shall submit a report to the complaint screening committee of the facts regarding the complaint.

(a) The complaint screening committee shall review the investigative report and make a recommendation to the board.

(b) The board shall find whether there has been a prima facie violation of KRS Chapter 311B or 201 KAR Chapter 46 and if a complaint shall be filed.

(2) If the board finds that a complaint does not warrant the issuance of a formal complaint, it shall:

(a) Dismiss the complaint; and

(b) Notify the complainant and respondent of the board's decision.

(3) If the board finds that a violation has occurred but is not serious, the board shall issue a private written admonishment to the licensee.

(a) A copy of the private written admonishment shall be placed in the permanent file of the licensee.

(b) The licensee shall have the right to file a response in writing to the private written admonishment within thirty (30) days of its receipt and may have it placed in a permanent file.

(c) Private admonishment shall not be subject to disclosure to the public under KRS 61.878(1)(l) and shall not constitute disciplinary action, but may be used by the board for statistical purposes or in subsequent disciplinary action against the credential holder or applicant.

(4) If the board finds that a complaint warrants a disciplinary action, the board shall issue a notice of disciplinary action and inform the licensee:

(a) Of the specific reason for the board's action, including:

1. The statutory or regulatory violation; and
2. The factual basis on which the disciplinary action is based;

(b) That the licensee may appeal the disciplinary action to the board within twenty (20) days after receipt of this notification, excluding the day he or she receives notice;

(c) That a written request for an administrative hearing shall be filed with the board within twenty (20) calendar days of the date of the board's notice. This request shall be sent to the Board of Medical Imaging and Radiation Therapy by mail or by hand-delivery to 275 East Main Street, Mailstop HS1C-A, Frankfort, Kentucky 40621;

(d) That if the request for an appeal is not timely filed, the notice of disciplinary action shall be effective upon the expiration of the time for the licensee to request an appeal; and

(e) That the administrative hearing shall be conducted in accordance with KRS Chapter 13B.

**Section 4. Settlement by Informal Proceedings. (1)** The board, through counsel and the complaint screening committee, may at any time during this process enter into informal proceedings with the individual who is the subject of the complaint for the purpose of appropriately dispensing with the matter.

(2) An agreed order or settlement reached through this process shall be approved by the board and signed by the individual who is the subject of the complaint and the chair.

(3) The board may employ mediation as a method of resolving the matter informally.

Section 5. Right of Appeal of Application. If the board denies an application or renewal for application, the board shall issue a notice of denial informing the applicant:

(1) Of the specific reason for the board's action, including:

(a) The statutory or regulatory violation; and

(b) The factual basis on which the denial is based;

(2) That the applicant may appeal the pending denial to the board within twenty (20) days after receipt of this notification, excluding the day he or she receives notice;

(3) That a written request for an administrative hearing shall be filed with the board within twenty (20) calendar days of the date of the board's notice. This request shall be sent to the Board of Medical Imaging and Radiation Therapy by mail or by hand-delivery to 275 East Main Street, Mailstop HS1C-A, Frankfort, Kentucky 40621;

(4) That if the request for an appeal is not timely filed, the notice of denial shall be effective upon the expiration of the time for the licensee to request an appeal; and

(5) That the administrative hearing shall be conducted in accordance with KRS Chapter 13B.

Section 6. Procedures Without a License. If the board finds an individual or licensee performed a diagnostic or therapeutic procedure without a valid license, the board shall issue a notice of civil penalty and inform the individual or licensee, and employer of the individual or licensee:

(1) Of the specific reason for the board's action, including:

(a) The statutory or regulatory violation;

(b) The factual basis on which the civil penalty is based; and

(c) The civil penalty to be imposed;

(2) That the individual or licensee may appeal the civil penalty to the board within twenty (20) days after receipt of this notification, excluding the day he or she receives notice;

(3) That a written request for an administrative hearing shall be filed with the board within twenty (20) calendar days of the date of the board's notice. This request shall be sent to the Board of Medical Imaging and Radiation Therapy by mail or by hand-delivery to 275 East Main Street, Mailstop HS1C-A, Frankfort, Kentucky 40621;

(4) That if the request for an appeal is not timely filed, the notice of civil penalty shall be effective upon the expiration of the time for the licensee to request an appeal; and

(5) That the administrative hearing shall be conducted in accordance with KRS Chapter 13B. (40 Ky.R. 1518; Am. 2126; eff. 3-20-2014.)